(17)

No. 91-471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEMICAL WASTE MANAGEMENT, INC.,
Petitioner,

v.

GUY HUNT, GOVERNOR OF THE STATE OF ALABAMA; ALABAMA DEPARTMENT OF REVENUE; and JAMES M. SIZEMORE, JR., COMMISSIONER OF THE ALABAMA DEPARTMENT OF REVENUE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Alabama may control the importation into the State of hazardous waste which endangers the health and safety of the State's citizens and the integrity of its environment.

2. Where the health and safety of Alabama's citizens, and its environment, are placed at risk by the landfilling of hazardous waste at Petitioner's commercial facility (which receives 85% to 90% of its hazardous waste from out-of-state), does the Commerce Clause prohibit Alabama from limiting the health, safety and environmental risks by imposing a disincentive in the form of a $72 per ton disposal fee upon imported hazardous waste while providing for the regulated disposal within the State of the State's own such waste.

RULE 29.1 STATEMENT

All parties to this case in the Court below are listed in the caption.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. The Substances Permanently Buried at Petitioner's Emelle, Alabama Facility Pose Serious Threats to Human Health and the Environment.

The hazardous wastes permanently buried at Emelle include "substances that are inherently dangerous to human health and safety and to the environment." Pet. App. 58a-59a. The Environmental Protection Agency (EPA) has identified 455 chemicals and substances as hazardous. J.A. 15-16. The Emelle facility is permitted to manage virtually all these chemicals and substances. *Id.* In addition, it is permitted to manage PCB's (polychlorinated biphenyls) and CERCLA waste, which encompasses even a wider range of chemicals under "the Clean Water Act or Air Act." *Id.*

These wastes are reactive, with ignition and explosion potential, and are toxic, carcinogenic, mutagenic, and damaging to human life and health. *Id.* The lower courts found these hazardous wastes consist of "ignitible, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." Pet. App. 59a. Studies confirm that when these substances get into the groundwater they cause cancer, malformed babies, miscarriages, and other deleterious health consequences. J.A. 16. Among the chemicals permanently buried at Emelle are arsenic, mercury, lead, cadmium, chromium and cyanide. Pet. App. 59a; J.A. 17. These metals are highly soluble in water and quickly move into the water table when presented with the opportunity. J.A. 17. The trial court found that "should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the groundwater and enter the food chain." Pet. App. 59a.

Despite treatment, many of the substances at Emelle will remain hazardous forever, Pet. App. 59a, and the

landfill will require monitoring and superintendence in perpetuity. Pet. App. 61a; J.A. 10-11, 138.

B. Emelle Is the Largest Hazardous Waste Landfill in the Country, and the Volumes of Waste Landfilled There Substantially Increased in the Years Preceding Act No. 90-326.

The Emelle facility was opened in 1977 and was acquired by Petitioner in 1978. R.T. 4; Def. Ex. 40, p. 2. The facility encompasses 2,700 acres. J.A. 12-13. Petitioner admits Emelle is the largest hazardous waste facility in the country; Rodger Henson, Petitioner's Vice President of Operations for the Southern Region, testified that he was not aware of any larger operation in the world. J.A. 12.

The volumes of hazardous waste buried annually at Emelle increased dramatically from 1985 to 1989, although it decreased after Act No. 90-326 went into effect on July 15, 1990:

1985	341,000 tons
1986	456,000 tons
1987	564,000 tons
1988	549,000 tons
1989	791,000 tons
1990	648,000 tons
1991	290,000 tons [1]

J.A. 23, and *EI Digest* 24, March 1992.

[1] While the total volumes of hazardous waste shipped to Emelle has declined since the Act's passage, *the percentage of out-of-state waste has remained the same.* Prior to enactment of the Act, 85 to 90% of the hazardous waste buried at Emelle was from out of state waste. Pet. App. 58a. From July 15, 1990 through December, 1991 the amount of out of state hazardous waste was 89% of the total. Ala. Dept. of Rev. Press Release, "U.S. Supreme Court to Hear State/Chem Waste Case," March 30, 1992; *The Montgomery Advertiser*, "High Court to Consider Extra Tax on Tainted Waste," March 31, 1992, p. 5A. The "Base Fee" applying to all waste was also increased by Act No. 90-326, to $25.60 per ton from $15.60 per ton. *See* Ala. Act No. 89-787 (former Ala. Code § 22-30B-2(a)).

In the five year period from 1985-1989 immediately preceding adoption of Act 90-326, the annual tonnage of hazardous waste permanently landfilled at Emelle increased 232%.

In 1989, approximately 40,000 truckloads of hazardous waste were delivered to Emelle. Pet. App. 62a. Petitioner was operating around the clock and trucks were backed up from the facility out onto the highway.[2] *Id.* The increased volumes have impaired the Alabama Department of Environmental Management's (ADEM) ability to monitor and perform its regulatory functions. J.A. 23-24.

Petitioner estimates Emelle has capacity for *another 100 years of operation*, and if left unrestricted the disposal volumes will increase annually. J.A. 9.[3]

C. While Hazardous Waste Is Regulated, the Regulations Do Not Assure That Permanent Burial of Hazardous Waste Is Safe.

The deficiencies of current EPA regulations and the ongoing dangers of hazardous waste disposal are highlighted by the General Accounting Office's (GAO) find-

[2] Bill Brock, Director of the Alabama Emergency Management Agency, the agency with responsibility for any emergency situation in the state, testified there were in excess of 100 trucks entering the facility some days, which impacted the roadways in the area. J.A. 39. Petitioner acknowledged that it handled 350 trucks in one day. J.A. 137.

[3] Another CWM witness testified the industry expects the amount of hazardous waste generated will decrease as more pressure is put on industry and better technology is developed. J.A. 131. However, a survey of U.S. and Canadian insurance actuaries showed "the actuaries believe chemical wastes will pose the greatest threat to public health and generate the greatest environmental cost to society by the turn of the century." Note, "Constitutionally Mandated Southern Hospitality: *National Solid Wastes Management Association and Chemical Waste Management, Inc. v. Alabama Department of Environmental Management*," 69 N. Car. L. Rev. 1001, 1022 n.143 (1991), citing 20 Env't Rep. (BNA) 539-40 (July 14, 1989).

ings in a June 1990 report to Congress.[4] J.A. 68-90; Def. Ex. 4; R.T. 232.

The GAO report notes, "As evidenced by the events at Love Canal, Times Beach, and thousands of other sites contaminated by hazardous wastes, land disposal of these wastes presents a significant threat to human health and the environment." J.A. 75.[5] GAO determined:

> The long-term effectiveness of current land disposal practices in controlling the migration of hazardous waste is not known, but EPA and others believe it is likely that some of the permitted hazardous waste disposal facilities will release hazardous substances into the environment at some period after they close. . . . Although EPA is aware of the potential for releases, it has not developed a strategy for addressing long-term postclosure concerns.

J.A. 71.

Even though EPA enacted regulations governing the disposal of hazardous waste, GAO found "[l]ittle experience-based data exist . . . on the long-term performance of these technology requirements in preventing waste migration . . . EPA and others believe that permanent containment of wastes is not possible . . . ." J.A. 72.[6] Based on these findings, GAO concluded that "land disposal of these [hazardous] wastes presents a significant threat to human health and the environment," and "the magnitude of post-closure liabilities that could be incurred simply cannot be measured at this time." J.A. 75, 81. EPA's

[4] GAO/RCED-90-64, "HAZARDOUS WASTE, Funding of Postclosure Liabilities Remains Uncertain" (June 1990) (Def. Ex. 4).

[5] GAO noted that despite the dangers, extensive hazardous waste landfilling is occurring. "Although past land disposal of hazardous waste has resulted in major environmental contamination and serious health effects, land disposal of these wastes continues. About 13 million metric tons of hazardous waste is disposed each year." J.A. 70.

[6] "EPA's position was, and still is, that absolute prevention of migration forever, or for the long term, is beyond the current technical state of the art." J.A. 83.

Science Advisory Board "determined that it is difficult to predict that improved land disposal will be protective of human health and the environment for the long-term." Def. Ex. 4 at 24; R.T. 232.

The following extract from that 1990 GAO report underscores the leakage problem already found to exist at the Emelle facility, as well as the seriousness of the long-term problems:

> University researchers we talked with also said that problems may exist with a long-term effectiveness of current waste containment technology. *One researcher said that there is little doubt that current hazardous waste facilities will leak.* He said that present research shows that *these systems will fail at some point, particularly after post-closure care ends,* and that *he views today's disposal of hazardous waste as merely a storage mechanism for hazardous waste that may have to be removed eventually.* Another university researcher told us that the technology used today is the best available but that it is simply unknown if it will keep wastes in place.

J.A. 84 (emphasis added).

At Emelle, the hazardous waste is buried in trenches cut into a formation called the Selma Chalk. The trenches are cut deep and the new ones contain double synthetic liners. R.T. 28-29. When filled, the trenches are closed, covered and resodded. Hanley dep. Vol. II, at 115. Underlying the Emelle facility is a 700 foot thick formation of fractured chalk. J.A. 29-31. Under the chalk is the Eutaw aquifer, a source of fresh water. Pet. App. 60a.

The risk of hazardous waste migration lies both in the leakage of the hazardous waste and the leakage of a poisonous leachate, which forms when rainwater and groundwater seep into the open or closed trenches. Pet. App. 59a. It is impossible to prevent leachate formation. J.A. 148.

Petitioner pumps the leachate from the trenches, stores it in storage tanks, and then ships it to an aqueous stor-

age facility in Texas. J.A. 132. The storage tanks hold 5 million gallons of leachate. With the current landfilled volumes, Petitioner pumps 10-15 million gallons of leachate from the trenches annually. J.A. 129. Obviously, this amount will increase as more waste is imported. Currently, there are 70 monitoring wells. J.A. 9-11. These wells must be monitored forever. *Id.* As more trenches are added, more wells will be installed.[7] Petitioner employs four chemists and technicians who spend half their time monitoring leachate. J.A. 129. The annual cost to Petitioner of monitoring leachate is $100,000-$150,000 per year, and the annual cost of gathering, collecting, storing, transporting and disposing of the leachate *at current volumes* is $2 to $3 million per year. J.A. 129. The security, maintenance, monitoring and disposal of leachate is required *forever*. J.A. 10-11. Petitioner has this responsibility under federal law for 30 years after closure of the site, but thereafter, the State of Alabama will bear this expense in perpetuity. *Id.*

Although some of the wastes will remain hazardous forever, Petitioner admits it does not know how long the trench liners will last. J.A. 127. Petitioner's expert witness and long-time consultant, William Brumund, testified the liners would only retard migration for the short term, measured in tens of years. Pet. App. 60a. In fact, in 1983 a consultant to Petitioner, Golder Associates, reported to Petitioner that the water pressure in the trenches would eventually cause leakage of fluid from the trenches into the surrounding chalk. Pet. App. 59a. Because the liners will not last indefinitely, Petitioner is relying upon the Selma Chalk to stop the mitigration of hazardous waste. J.A. 127. However, as the chalk has faults and fractures which conduct fluids, it is significant that some of the older trenches at Emelle are *already* leaking leachate. Pet. App. 59a. Former Alabama state Geologist Tom Joiner testified that leachate

[7] The wells themselves, since they penetrate into the Selma Chalk, create new conduits for hazardous waste to reach the underlying groundwater. Pet. App. 61a.

has moved out of the trenches at Emelle, and the flow is moving into the Selma Chalk. J.A. 43.

Furthermore, there are faults and joints (cracks) in the Selma Chalk that are known geologically "to be commonly capable of transmitting water", and thus, leachate. J.A. 29. Dr. Richard Groshong, a geologist, performed a study of the faults in the Selma Chalk and found "considerable evidence" that at least some of the faults are transmitting water now. J.A. 29-30.[8] Dr. Groshong testified that it is unknown if the faults go all the way down to the Eutaw aquifer underlying the Emelle facility, but it is "perfectly possible" that they do. *Id.*[9] Finally, Dr. Groshong testified the faults and fractures in the Selma Chalk have not been properly mapped and that aerial photographs confirm faults in the trenches at Emelle. J.A. 31.

Leakage of leachate from the Emelle trenches occurs in two ways. Leachate can leak downward into the Selma Chalk. Pet. App. 12a. A second, equally serious, concern is lateral migration close to the surface of the trenches. Emelle is located in a drainage basin of the Tombigbee and Noxubee Rivers, which are major sources of fresh water to the State of Alabama. Pet. App. 60a. Leachate can flow laterally down the natural drainage gradient into the tributaries of the Tombigbee and Noxubee. *Id.*

Petitioner's expert witness Brumund testified that leachate will continue to be generated at the facility. J.A. 148. Joiner further testified that the facility will have to be monitored, with regulatory surveillance and

[8] Dr. Groshong found that the chalk was "chemically etched," indicating conduits for water, and is "significantly stained with iron" which is evidence of water leaking through the chalk. J.A. 30.

[9] Time estimates of the speed at which leachate will penetrate through the chalk to the underlying Eutaw acquifer are greatly variable. EPA estimates ranged upward from 330 years, with CWM estimating 10,000 years. Pet. App. 60a. Nonetheless, faults and fractures greatly accelerate travel time through the chalk and, as noted above, some faults and fractures may extend down to the Eutaw aquifer. Pet. App. 61.

maintenance *forever*, and the grounds protected against future erosion. J.A. 47, 49.[10]

There have been spills, release of emissions and trucking accidents at Emelle. J.A. 20-22. Emelle is in an earthquake zone, yet Petitioner has no contingency plans in the event of an earthquake. J.A. 19, 40.[11]

D. Current Financial Assurance Requirements Are Inadequate To Protect Against the Perpetual Risks.

As to protecting against future liabilities, GAO noted "the magnitude of postclosure liabilities . . . simply cannot be measured at this time." J.A. 81. Similarly, Bernard Webb, an insurance specialist, testified that very little is known about the effectiveness of the technology for hazardous waste landfilling[12] and "insurance is for practical purposes almost unavailable." J.A. 115. He testified given the scope of Emelle, for Alabama's purposes insurance is not "available in amounts adequate for the risk." J.A. 116. Webb estimated that the State of Alabama would need an insurance policy with limits of $1 billion to insure it against the risks of Emelle. J.A. 123. The premium for such a policy would run from $150 million a year, J.A. 124, and there is no such policy

[10] Joiner's exact testimony concerning the perpetual monitoring and superintendence was as follows:

> You know it's one thing to think 30 years and something else to think 100 years; but when you think about it's going to be there as long as this State is here, then that puts another perspective on it.

J.A. 49.

[11] There was an earthquake in Sumter County, Alabama wherein Emelle is situated in 1886 which caused a one-half foot to one foot vertical ground movement. J.A. 126. Joiner testified that the past earthquake is significant because it is reasonably certain to happen again and that it would not take a major earthquake to crack the materials that seal some of the faults and allow new avenues for the leakage of hazardous waste. J.A. 48-50.

[12] Hanley of CWM testified, "The industry is only 10 years old and people are continuing to learn about leachate and water pressures and secondaries. There is no definite answer." J.A. 140.

available, J.A. 121. He estimated that if the Eutaw aquifer was contaminated the cost would be virtually incalculable, in the billions of dollars. J.A. 118.[13]

GAO noted "[p]rivate sector options for funding postclosure liabilities include private insurance, coinsurance, reinsurance, and voluntary risk pooling." J.A. 87. GAO found that "[b]ecause of the unknown liabilities and perceived risk associated with hazardous waste disposal facilities after they close, these postclosure funding mechanisms are currently not viable options." *Id.*[14]

Congress has recognized the potential unlimited liability for hazardous waste sites. In enacting the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675, Congress established a $200 million Post Closure Liability Trust Fund (PCLTF) to assume liabilities at permitted hazardous waste disposal facilities after closure.[15] J.A. 77. However, Congress became concerned that the fund would not have sufficient resources to pay the magnitude of liabilities that would be incurred. J.A. 78. Accord-

[13] Mr. Webb estimated that in the highly unlikely event of a tornado striking the PCB tanks at Emelle, the remedial cost would range from $126 million to $1.9 billion. J.A. 118. While also highly unlikely, if a truck carrying PCB's crashed into the adjoining river, the remedial cost would be from $10-$99 million. *Id.*

[14] The unavailability of insurance is due in part to "[t]he inability to measure or quantify the liability exposure at hazardous waste facilities along with a perception by the insurance industry that liabilities are *certain to occur after these facilities close*." J.A. 88 (emphasis added).

Similarly, risk pools are "not a viable option for postclosure liability funding." J.A. 89. "Because postclosure liability is uncertain and potentially unlimited, Treasury determined that underwriting the risk of postclosure is no more acceptable to mutual associations than to individual insurance companies." J.A. 89.

[15] After transfer of liability, the fund, generated from a tax on disposed hazardous waste, would pay for monitoring and maintenance beyond the 30-year postclosure period and for damages, such as groundwater contamination and necessary clean up operations. 42 U.S.C. § 9641.

ingly, in enacting the later SARA amendments Congress suspended the transfer of liability to the PCLTF and abolished the fund. J.A. 78; Pub. L. 99-499, § 201.

As GAO noted, "Postclosure financial assurance is currently required by EPA only for 30-year maintenance and monitoring as well as identified corrective action costs." J.A. 86. However, there is no financial assurance "for potential but unknown postclosure liabilities such as on-site cleanup or off-site damage." *Id.* EPA does not require funds to be set aside for these contingencies. *Id.* Nor is there any long term assurance owner-operators will or can provide remediation: "No one can predict what the future financial situation of any owner operator will be in the long-term with any certainty, and if an owner operator were to become bankrupt or otherwise go out of business, there is little likelihood that funding would be available for unanticipated postclosure costs." J.A. 86.

Thirty years after closure Alabama will have the financial burden of maintaining these expensive monitoring systems in *perpetuity*. The trial court found:

> . . . Although it will be necessary to monitor, regulate, maintain (including the pumping, collection, storage, transportation and disposal of leachate from the trenches), and secure the facility forever, Petitioner has made no provision for the payment of such costs beyond a period of 30 years after closure. Additionally, there has been no provision for the payment of any abatement, corrective, or remediation costs, compliance monitoring, third-party damages or natural resource damage.
>
> . . . Whenever Petitioner's planned or unplanned cessation of activities at Emelle occurs, there will be substantial financial and environmental risks to the people, businesses, and corporations of Alabama.

Pet. App. 62a-63a.

E. The Act Is Consistent With Federal Policy.

In the 1984 amendments to the Resource Conservation and Recovery Act (RCRA), Congress declared its policy that "whenever feasible the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible." 42 U.S.C. § 6902(b). Moreover, Congress has expressed a preference against the landfilling of hazardous waste.[16] Mr. Henson of Petitioner testified that as a result of the Additional Fee, less volume of hazardous waste is shipped to Emelle, and there are "probably some waste minimization programs underway." J.A. 128.

Further, in the Superfund Amendments and Reauthorization Act (SARA), Pub. L. 99-499, amending scattered sections of 42 U.S.C. §§ 9601-9675 (Supp. IV 1986), Congress required each state to demonstrate capacity to dispose of its hazardous waste for the next twenty years by disposal in in-state facilities or by agreements with other states. Petitioner's expert witness Brumund testified a hazardous waste disposal site could be engineered in each state in the nation. J.A. 143.[17]

The trial court found, "Although waste landfills can be designed and engineered to operate in practically every state of the United States, only a very few commercial sites presently exist. Efforts to obtain permits for new sites in other states are resisted by citizens of those states." Pet. App. 57a. This local opposition to new sites is called the "not-in-my-backyard" syndrome (NIMBY). "[O]nly one additional hazardous waste landfill has been

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[16] In the Congressional findings accompanying the 1983 amendments to RCRA, Congress found that "reliance on land disposal should be minimized or eliminated and land disposal, particularly landfill and surface impoundments, should be the least-favored method of managing hazardous wastes. . . ." 42 U.S.C. § 6901(b)(7).

[17] Currently in the United States, there are only 21 hazardous waste commercial landfills located in sixteen states. Smith, "Hazardous Waste Landfill Facility Information," *EI Digest*, at 26-27 (Table I) (March 1992). Most of these facilities are much smaller than the Emelle landfill. *Id.*

permitted in the United States since the effective date of RCRA, November 17, 1980". Pet. App. 57a.[18]

A recent development since the decision of the Alabama Supreme Court is the adoption of a resolution by the National Governors Association (NGA) in response to the NIMBY effect on the hazardous waste problem. The NGA adopted a policy encouraging a "fee-based" approach to the regulation of interstate movement of hazardous waste. National Governors Association, Policy Positions, "D-17, Hazardous Waste Management, § 17.8 Interstate Shipments of Hazardous Waste," (1991-92); NGA, RCRA Reauthorization Subcommittee State/EPA Committee Report, "Recommendation for Reducing the Tensions Associated with the Interstate Movement of Subtitle C Wastes," September 13, 1991, at 1-3. The new policy endorses a differential fee between the disposal of in-state and out-of-state hazardous waste. The policy would allow an importing state to levy a "host state fee" on hazardous waste "imported for management." *Id.* The differential, or host, fee would be "phased-in over time and capped as a multiple of the state's existing in-state fee" (or exporting state's fee, if higher).[19]

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[18] The SARA capacity assurance requirements were enacted in response to NIMBY:

> Unfortunately . . . Congress failed to anticipate the intensity of public opposition to new and expanded waste management facilities. While everyone wants hazardous waste managed safely, hardly anyone wishes it managed near them. This is the NIMBY syndrome. Yet if RCRA and Superfund programs are to work—public health and the environment are to be protected—the necessary sites must be made available.

132 *Cong. Rec.* § 14924 (Oct. 3, 1986) (Remarks of Senator Chafee). *See generally* Delogu, *"NIMBY" as a National Environmental Problem*, 35 S. Dak. L. Rev. 198 (1990).

[19] The purpose of the differential fee is:

> This fee would accomplish two objectives: It would compensate importing states for the costs and environmental risks they bear as hosts to these facilities; *and* it would provide an additional economic incentive for generators to either reduce their waste generation or create *in-state* management options.

Id.

Both options are in accord with Congressional policy in RCRA and SARA to discourage landfilling of hazardous waste and for each state to provide capacity assurance.

This burden was expressly recognized in the findings by the Alabama Legislature that:

> As the site for the ultimate burial of hazardous wastes and substances, the state incurs a permanent risk to the health of its people and the maintenance of its natural resources that is avoided by other states which ship their wastes to Alabama for disposal.

Ala. Act No. 90-326, § 1(d); Ala. Code § 22-30B-1(d); Pet. App. 103a.

Id. at 1. The policy calls for a 4-1 differential in the fees charged for out-of-state and in-state hazardous waste landfilling. *Id.* Attachment A. The differential under the Alabama Act is less than 3 to 1, well within 4-1 differential recommended by the NGA.

SUMMARY OF ARGUMENT

Whether the "commerce" in this case is in hazardous waste, or waste disposal services or in landfill space, the actual thing being bought and sold is a *transfer of risk.* Public health dangers, and the risk of potentially catastrophic environmental damage, are transferred to Alabama *in perpetuity*, and avoided by those in other states who pay to have this risk transferred. Petitioner is selling the risk of pollution of the Eutaw aquifer, to those in other states whose groundwater will remain uncontaminated because they sent their wastes to Alabama. Petitioner is selling the risk of lateral seepage of leachate into the tributaries of the Tombigbee River, to those whose rivers may remain unspoiled because they sent their waste to Alabama. Petitioner is selling the future health of Alabama citizens, and the future integrity of Alabama's environment, to those in other states who will never have to face the social consequences. Certainly those who drafted the Commerce Clause did not

envisage that they were creating a right to engage in unfettered interstate "commerce" of this nature.

The differential fee structure adopted by the Alabama legislature serves a legitimate purpose of accepting the State's responsibility for managing its own dangerous waste, while protecting its citizens and environment from the risks caused by the shipment into the State of uncontrolled volumes of additional dangerous wastes. This purpose cannot be adequately served by any available nondiscriminatory alternative.

Absent preemption by Congress, states may, under their police powers, control the movement into the State of articles which endanger the public health or safety or the integrity of the state's environment. This power has been consistently recognized by this Court, from Chief Justice Marshall's early comments on the subject in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), through the recent decision in *Maine v. Taylor*, 477 U.S. 131 (1986). This Court's decisions make clear that this power is not diminished by the fact that the state may provide for the regulated management or disposal of similarly dangerous items occurring within the state. States may require dangerous articles already in the state to be managed or disposed of as necessary to control and minimize the dangers of those articles, while controlling the movement of similarly dangerous articles into the state.[20]

This state power has been so universally understood and so well-settled by this Court's decisions that, in the context of articles which are in fact dangerous, no credible argument to the contrary could have been imagined prior to 1978. And it remains clear that this traditional framework continues to govern state measures regulat-

[20] Petitioner, however, argues that where a problem already exists within a state, the state cannot control importation of more such problems because there is an available nondiscriminatory alternative—accept an unlimited quantity of more such problems on the same terms which the state employs to deal with the problems it already has.

ing every dangerous item *except* "waste."[21] But since 1978, the waste disposal industry has seized on uncertainties surrounding *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), to attempt (with some success) to defeat state efforts designed to manage waste disposal for the protection of public health, safety and the environment.

The uncertainty in *Philadelphia v. New Jersey* is *not* centered on the legal standard applied. The uncertainty concerns the majority's understanding or conception of the *facts* to which the standard was being applied. Did the Court really hold that public health and environmental concerns were *irrelevant*? Or did the Court simply not accept the existence of what it referred to as "allegedly harmful effects"? 437 U.S. at 628. Did the Court really hold that New Jersey was compelled to accept the burden of importation of *dangerous* waste, *because* the State provided for disposal within the State of its own such waste? Or did the court refer to the fact that New Jersey allowed disposal of its own waste as evidence to support its conclusion that the garbage was not, in fact, dangerous?

The language of the opinion, *if merely read in isolation*, may be susceptible to the interpretation of the case advanced by Petitioner and the Solicitor General. However, when the case is considered within the framework of this Court's prior and subsequent decisions, it is clear that the construction of the case urged by Petitioner and the Solicitor General is inconsistent with principles which have been well established and universally recognized for over a century and a half.

[21] The confusion surrounding *Philadelphia v. New Jersey* has, however, in at least one instance resulted in a court erroneously striking down a state law outside the waste context. The First Circuit incorrectly relied upon *Philadelphia v. New Jersey* to distinguish Maine's baitfish quarantine law from numerous indistinguishable measures designed to control the spread of animal diseases, which measures have been consistently upheld by this Court. *U.S. v. Taylor*, 752 F.2d 757, 761 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 1986).

The majority opinion in *Philadelphia v. New Jersey* applies the correct rule of decision where the court rejects purported health, safety or environmental concerns and finds a state measure to involve simple economic protectionism. *See, e.g. New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988). The dissent, however, expresses the correct rule of law where the court accepts that the state is in fact acting in response to legitimate concerns. *See, e.g. Maine v. Taylor*, 477 U.S. 131 (1986); *see also* cases cited *infra* n.23. The disagreement between the majority and minority in *Philadelphia v. New Jersey* appears to have been not on which legal standard to apply to a given set of facts, but rather a disagreement concerning the facts to which a standard was to be applied.

Hazardous waste landfills are not natural resources. They are man-made, engineered facilities which exist and operate because, and *only* because, the states in which they are located allow them to exist and operate. Hazardous waste is not hauled across the continent because of any value of commerce in the waste; this movement occurs due to the negative value, the dangers, of having such waste present. The fact that Alabama permits the Emelle facility to exist and operate to provide for the management of the State's *own* hazardous waste does not mean that Alabama is required to accept unlimited additional quantities of imported hazardous waste, or to allow Petitioner to leave the State holding the perpetual risk and burden of whatever unlimited quantities of hazardous waste Petitioner may wish to bury in Alabama.

The construction of the Commerce Clause urged upon this Court by Petitioner and its amici is inconsistent with this Court's numerous earlier decisions recognizing and upholding the power of the States to control the movement into the State of articles which endanger public health, safety or the environment. These cases are of significant modern-day relevance, forming the constitutional framework for numerous state regulatory measures. The reasoning of these cases and the principles applied are consistent with, and form the basis of, the currently-

employed Commerce Clause standard applied to state measures that discriminate against out of state articles on grounds of health, safety, or environmental dangers. This Court's decisions have not turned on a "different threat" or similar/dissimilar threat distinction. Under the standard which Petitioner urges the Court to adopt in this case, the only State that could continue to control the movement into the state of diseased livestock would be one whose cows never got sick.

Permitting any new hazardous waste disposal facility is a politically difficult undertaking for state and local officials. A holding by this Court that any such facility which is permitted must be allowed to import and leave the local community burdened with such additional hazardous waste as the operator of the facility may choose would make the permitting of any new commercial hazardous waste disposal facility a political impossibility. Any state would, understandably, be hesitant to allow the waste disposal industry to operate within the state under the rules Petitioner seeks to establish in this case.

ARGUMENT

ALABAMA'S FACIALLY DISCRIMINATORY FEE STRUCTURE, WHICH IMPOSES A $72 PER TON ADDITIONAL FEE ON OUT-OF-STATE WASTE, DOES NOT VIOLATE THE COMMERCE CLAUSE

I. Alabama Has Legitimate Concerns About The Landfilling Of Large Volumes Of Imported Hazardous Waste.

The public health, safety and environmental dangers resulting from the activity which the challenged statute was designed to control are well-documented and uncontroverted in the record of this case. Any suggestion that current technology or regulations are adequate to control these dangers is refuted by the findings of Congress and the GAO, as well as by the facts established in this case.[22]

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[22] Petitioner admits seven sanctions against it in the past by EPA for regulatory violations with respect to operations of the Emelle

As Congress has declared, "reliance on land disposal should be minimized or eliminated, and land disposal, *particularly landfill* and surface impoundment, should be the least favored method for managing hazardous wastes," because such facilities "*are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment.*" Resource Conservation and Recovery Act of 1976, as amended (RCRA) § 1002(b)(7), 42 U.S.C. § 6901(b)(7) (emphasis added).

The GAO reported to Congress in 1990 that current technology is inadequate to protect against the long-term risks of landfilling hazardous waste. J.A. 69-90. GAO found that "EPA and others believe that permanent containment of wastes *is not possible* and that *leakage will occur* at some time after the 30-year postclosure period." J.A. 72 (emphasis added).

As the Solicitor General acknowledged in his brief in support of certiorari,

> "[t]he State of Alabama plainly has legitimate and well-founded concerns about the disposal of hazardous wastes at the Emelle Facility. The health, safety and welfare of its citizens in the area of the facility, the safety of travelers on the roads leading to the facility, and the future condition of the natural resources and the environment of the State are all potentially implicated by the disposal of hazardous wastes."

Brief for U.S. in support of petition at 8.

facility. Exhibit 20 & 20A to Rodger Henson's deposition, identified at pages 118-125. The deposition was offered (T.R. 572) and admitted (T.R. 573). There were 12 on-site spills at Emelle from 1989 to the October 1990 trial. J.A. 20-22. Petitioner has also recently admitted in a 10K filing with the United States Securities and Exchange Commission that it currently faces six potential government actions involving unnamed waste handling sites, each of which actions involve potential sanctions of more than $100,000; and that it is under criminal investigation for possible procurement and environmental law violations in connection with cleanup work it did for the Army Corps of Engineers. *The Wall Street Journal*, April 2, 1992, at A4.

In addition, federal officials recently said that more than 750,000 pounds of dirt contaminated with small amounts of radioactive uranium from the federal nuclear weapons facility at Oak Ridge, Tennessee were believed to have been improperly sent to the hazardous-waste landfill at Emelle. *The Birmingham News/Post Herald*, February 15, 1992, at 1A.

II. *Philadelphia v. New Jersey* Is Not Controlling In The Context Of Real And Substantial Health, Safety And Environmental Risks.

Petitioner, in effect, is asking this Court to establish as a rule of constitutional law the following:

> If a state permits the disposal within its borders of its own noxious items which threaten public health, safety and the environment, then the state must also accept and allow disposal within the state, on the same terms, all such noxious items from all other states, regardless of the increased risk thereby created to the health and safety of citizens of the recipient state and to its environment.

Petitioner argues that such a rule follows from this Court's decision in *Philadelphia v. New Jersey*. Petitioner's construction of *Philadelphia v. New Jersey* would place that case in direct conflict with every relevant decision of this Court before and since that decision.

Philadelphia v. New Jersey should be interpreted, as the Supreme Court of Alabama interpreted the case, in a manner consistent with well-established law—as a case striking down a measure to protect in-state interests from out-of-state economic competition. Numerous decisions of this Court recognize the states' power to control importation of dangerous items.[23] Petitioner's only basis for

[23] *See Maine v. Taylor*, 477 U.S. 131 (1986). For other examples (hereinafter referred to collectively as "quarantine cases"), see *Clason v. Indiana*, 306 U.S. 442 (1939); *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926); *Sligh v. Kirkwood*, 237 U.S. 52 (1915); *Asbell v. Kansas*, 209 U.S. 251 (1908); *Crossman v. Lurman*, 192 U.S. 189 (1904); *Reid v. Colorado*, 187 U.S. 137 (1902); *Compagnie Fran-*

attempting to distinguish these cases is to argue that *Philadelphia v. New Jersey* held that a state's unquestioned power to control importation of such items somehow disappears merely because the state is already dealing with similarly dangerous items to a limited extent within the state.

It is not disputed that one ton of out-of-state waste is no more dangerous than one ton of *comparable* in-state hazardous waste.[24] But that is not determinative. It is also indisputable that the 788,000 total tons of hazardous waste buried by Petitioner at Emelle in 1989 present a considerably greater threat to Alabama than the 69,000 tons of Alabama-generated waste buried there that year. Even so, Petitioner unreasonably argues that the State loses its otherwise clear power to protect itself against overwhelming volumes of out-of-state dangerous waste

caise v. State Bd. of Health, Louisiana, 186 U.S. 380 (1902); *Smith v. St. Louis & Southwestern R. Co.*, 181 U.S. 248 (1901); *Rasmussen v. Idaho*, 181 U.S. 198 (1901); *Louisiana v. Texas*, 176 U.S. 1 (1899); *Missouri, Kansas, & Texas R. Co. v. Haber*, 169 U.S. 613 (1898); *Kimmish v. Ball*, 129 U.S. 217 (1889).

Other cases recognizing the State's power include *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Hannibal and St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

[24] This assumes, of course, that the wastes are *comparable*. Out-of-state waste does, however, differ from in-state waste in one important respect. As discussed in the amicus brief submitted by the States of Ohio and Kentucky, states are unable to monitor out-of-state waste streams at their source, leaving the state with substantial uncertainty as to the hazardous constituents. Indeed, out-of-state waste often moves through brokers and even Petitioner is without knowledge of the source of the waste. Statement of George Vander Velde, Petitioner's Vice President of Science and Technology, to the Committee on Interior and Insular Affairs, U.S. House of Representatives, February 20, 1992. A copy of Mr. Vander Velde's written statement has been lodged with the Clerk of this Court. The dangers inherent in such uncertainty were recently emphasized by the discovery that Petitioner had illegally buried in Alabama some 750,000 pounds of low-level radioactive waste from government contractors. See *supra* n.22.

simply by being responsible enough to permit the regulated disposal within the State of its own such waste.

It is clear that the majority opinion in *Philadelphia v. New Jersey* considered New Jersey's ban on out-of-state garbage to amount to simple economic protectionism, protecting New Jersey residents from out-of-state competition for landfill space. This Court has consistently characterized *Philadelphia v. New Jersey* as a case involving economic protectionism, in contrast to environmental protection. For example, in *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456 (1981), this Court cited *Philadelphia v. New Jersey* as supplying the rule of decision where "a state law *purporting* to promote environmental purposes is in reality 'simple economic protectionism'." 449 U.S. at 471 (emphasis added).[25]

In *Maine v. Taylor*, 477 U.S. 131 (1986), this Court cited *Philadelphia v. New Jersey* for the proposition that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually per se rule of invalidity'" while, in contrast to *Philadelphia v. New Jersey*, "there is little reason in this case to believe that the legitimate justifications that the State has put forward for its statute are merely a sham or a 'post hoc rationalization'." *Maine v. Taylor*, 477 U.S. at 148-49.

Again, in *Maine v. Taylor*, this Court used *Philadelphia v. New Jersey* as an example of a case *in contrast* to cases "where, as in this case, out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity

[25] Given the substantial increase since 1978 in the understanding of the health and environmental risks associated with the landfilling of solid waste such as that involved in *Philadelphia v. New Jersey*, that case might be decided differently today on a record establishing those risks. Such a record is unlikely to be developed so long as lower courts continue summarily to strike down responsible state and local efforts to manage waste disposal problems.

of its natural resources" to make the point that "[n]ot all intentional barriers to interstate trade are protectionist, however, and the Commerce Clause 'is not a guarantee of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community'." *Maine v. Taylor*, 477 U.S. at 148 n.19 (quoting *Robertson v. California*, 328 U.S. 440, 458 (1946)).

The Supreme Court of Alabama correctly observed that this Court's decisions "make a distinction between state measures that discriminate arbitrarily against out-of-state commerce in order to give in-state interests a commercial advantage, i.e., simple economic protectionism, and state measures that seek to protect public health or safety or the environment," citing *Maine v. Taylor*, 477 U.S. at 148 n.19 (1986). Pet. App. 41a. Although this Court made exactly such a distinction in *Maine v. Taylor* (and numerous other decisions), Petitioner claims that this Court's decisions "expressly and conclusively reject the Alabama Supreme Court's 'distinction'." Brief for Petitioner at 26-27. To the contrary, as this Court has stated, "[t]his distinction between the power of the State to shelter its people from menaces to their health or safety. . ., even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law." *H. P. Hood & Sons v. Dumond*, 336 U.S. 525, 533 (1949). *See also Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982) ("For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.")

Contrary to Petitioner's interpretation of the case, *Philadelphia v. New Jersey* does not eliminate this fundamental distinction and elevate wastes to a level of constitutional protection unique among dangerous articles.

Philadelphia v. New Jersey merely holds that state measures discriminating against out-of-state waste are subject to the same review under the Commerce Clause as state measures discriminating against other out-of-state items. But Petitioner's argument leaps from the result in *Philadelphia v. New Jersey* to the conclusion that any state restriction on the importation of waste must be held invalid, without regard to whether the case involves legitimate health, safety, or environmental concerns, or merely simple economic protectionism.[26]

The interpretation of the Commerce Clause advanced by Petitioner simply cannot be reconciled with this Court's decision in *Maine v. Taylor* and numerous earlier decisions of this Court recognizing the power of the states to regulate the importation in interstate commerce of items which pose threats to the health, safety or environment of the state.[27] It is illogical to assert that while the Commerce Clause allows a state to restrict the importation of baitfish on the grounds that some of the imported baitfish *might* cause some disturbance in the aquatic ecology, the Commerce Clause requires states to suffer the importation of unlimited volumes of hazardous wastes. These wastes, without dispute, "are inherently dangerous to human health and safety and to the environment" and consist of "wastes which contain poisonous and cancer causing chemicals and which can cause birth defects,

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[26] This Court rejected New Jersey's argument that its ban on out-of-state garbage was analogous to health-protective measures which this Court had repeatedly upheld, distinguishing the quarantine cases as involving restrictions on articles whose "very movement risked contagion and other evils," from the ordinary garbage where there was "no claim here that the very movement of waste into or through New Jersey endangers health." *Philadelphia v. New Jersey*, 437 U.S. at 628-29. In contrast, the trial court in this case found that "[t]he hazardous wastes landfilled at the Emelle facility are inherently dangerous in their transportation and movement into or from one place to another throughout the State of Alabama." Pet. App. 62a.

[27] See cases cited *supra* n.23.

genetic damage, blindness, crippling and death." Pet. App. 11a.

The Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. at 151. The Commerce Clause places the value of free trade in goods above a state's parochial interest in protecting or favoring its own local producers; it does not place the "value" of "free trade" in poisonous waste materials which cause cancer, birth defects, genetic damage, blindness, crippling and death, for the purpose of burying such materials in the ground,[28] above the state's responsibility for protecting the health and safety of its citizens and the integrity of its environment. Alabama has a reason, apart from the origin of the wastes, to control importation of the wastes—they are wastes which are "inherently dangerous to human health and safety and to the environment." Pet. App. 11a.

III. Alabama's Differential Fee Structure, As A Measure To Control The Movement Into The State Of Dangerous Waste Materials, Is A Valid Exercise Of The State's Police Power Under *Maine v. Taylor* And The Older Quarantine Cases.

A. On the Basis of the Health, Safety, and Environmental Dangers Documented in This Case, Alabama May Control the Movement of Hazardous Waste Into the State, While Providing for Regulated Disposal Within the State of Its Own Waste.

Under the principles established in the quarantine cases and reaffirmed in *Maine v. Taylor*, Alabama may control the movement of dangerous waste into the state, just as Alabama and other states control the importation of other dangerous items.[29] Petitioner and its amici

[28] Due to the significant public health and environmental dangers created by land disposal of hazardous wastes, Congress has declared that such disposal "should be the least favored method for managing hazardous wastes." 42 U.S.C. § 6901(b)(7).

[29] This Court's earlier cases recognizing the power of the states to control movement of dangerous articles into the state are not

argue, however, that the rationale of the quarantine cases does not apply, asserting that the states in those cases also "banned" the equivalent in-state dangerous items. As expressed by the Solicitor General, "Alabama's Additional Fee is not a quarantine statute because Alabama does not preclude the disposal of hazardous waste that is generated within its borders." Brief of U.S. at 25; see also Brief for Petitioner at 31 n.21. It is not clear just what Petitioner or the Solicitor General think the states in these cases did (or still do) about their own diseased livestock, animal carcasses or other noxious items, but it is unlikely that those states dealt with the problems by commanding, for example, that cows not get sick or die within the state. These States required (and states still generally require) that dangerous items within the state be *disposed of*, or managed, in accordance with the state's regulatory requirements, just as Alabama requires that its own hazardous waste be disposed of or managed in accordance with Alabama's regulatory requirements.

Indeed, this is clearly shown by *Clason v. Indiana*, 306 U.S. 439 (1939). The Solicitor General erroneously characterizes *Clason* as "rejecting [a] Commerce Clause challenge to [a] statute restricting transport of dead animals, *noting that the State has a similar scheme respecting in-state carcasses.*" Brief of U.S. at 24 (emphasis added). In fact, Mr. Clason was convicted by Indiana of transporting what was apparently an *in-state* dead horse *out* of that State to Illinois. 306 U.S. at 440. *Clason* did not note "that the State has a similar scheme respecting in-state carcasses"; the entire case involved the application of that in-state scheme, which required and regulated

relics of the past with no modern relevance. These cases establish the constitutional framework within which states control health, safety and environmental risks by controlling the importation of dangerous articles. *See, e.g., Mendicoa v. Wyoming*, 780 P.2d 1346 (Wyo. 1989) (cattle); *Winkler v. Colorado Dep't of Health*, 193 Colo. 170, 564 P.2d 107 (1977) (pets for commercial sale); *Wyant v. Figy*, 340 Mich. 602, 66 N.W.2d 240 (1954) (bees); *State v. Lovelace*, 228 N.C. 186, 45 S.E. 2d 48 (1947) (cattle).

disposal, within Indiana, of in-state items of a type which the State unquestionably could prohibit from being brought into the State.

Although not an issue in the case, both the Indiana Supreme Court and this Court recognized that the State plainly could prohibit the movement of such items into the State. *Clason v. Indiana*, 306 U.S. at 442 & n.2; *Clason v. Indiana*, — —Ind. ——, ——, 17 N.E.2d 92, 94 (1938). The Indiana court and this Court both recognized that, for purposes of analyzing a state measure under the Commerce Clause, there is no difference between a prohibition against movement out of the state and a prohibition of movement into the state. The Indiana Court framed the question as:

> "[W]hether the state, in the exercise of its police power, may prohibit the *interstate* transportation of dead animals by a plan that allows *intrastate* transportation by its licensees under circumstances that may result in the profitable handling of such articles within the state."

—— Ind. at ——, 17 N.E.2d at 94 (emphasis added). This Court addressed the question as framed by the appellant:

> "[Whether] the Indiana Dead Animal Disposal Act of 1937 was valid as a reasonable regulation or quarantine and not invalid as a discriminatory prohibition of interstate commerce in commodities recognized as legitimate articles of intrastate commerce."

306 U.S. at 443.

The Indiana statute upheld in *Clason* facially discriminated—it blocked commerce at the state line in articles which posed a risk to public health, while providing for commercial disposal within the state of identical in-state articles. The case can hardly be dismissed as "old" and of no modern relevance; the current version of the Indiana provision is essentially identical. *See* Ind. Code Ann. § 15-2.1-16-15. But under the Commerce Clause standard urged upon this Court by Petitioner and its

amici, this Indiana statute, previously upheld by this Court, would be struck down for blocking interstate commerce in articles which are permitted to be disposed of within that State.[30]

Far from supporting the argument that Alabama cannot keep out out-of-state hazardous waste because it allows disposal of its own such waste, *Clason* is instructive because the case shows the in-state side of the quarantine cases—the states provide for regulated disposal within the state of in-state dangerous items, while controlling the importation of more such dangerous items from outside the state.

Just as Alabama requires in-state hazardous waste to be disposed of in accordance with the State's requirements governing such disposal, while controlling the importation of additional hazardous waste, most, if not all, states require regulated disposal of in-state diseased or dead animals, plants infected with disease or insect pests, germ-infected articles or other items which might be harmful to health, safety or the environment, while prohibiting the importation of more such items into the state. The construction of the Commerce Clause advanced by Petitioner and its amici questions the constitutionality of all such state measures.[31] If the Solicitor General is correct in

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[30] The Indiana statute in *Clason* required in-state dead animals, an unavoidable by-product of livestock production, to be either disposed of on-site in accordance with the State's requirements regulating the method of disposal, or transported in a regulated manner to permitted, regulated commercial disposal facilities. 306 U.S. at 440-42 & n.1. Similarly, Alabama requires in-state hazardous waste, to some extent an unavoidable by-product of industrial production, to be either disposed of on-site in accordance with Alabama's requirements regulating the method of disposal, or transported in a regulated manner to permitted, regulated commercial disposal facilities.

[31] Georgia, for example, prohibits the movement of dead animals into the State, except by special permit or for research purposes. Ga. Code Ann. § 4-5-8. Under the Commerce Clause "rule" advanced by Petitioner and the Solicitor General, this statute would

his assertion that "out-of-state articles of commerce must be treated the same as in-state articles of commerce when they are indistinguishable" (Brief of U.S. at 27), the only state which could constitutionally forbid the importation of diseased animals would be one whose cows never got sick.

It appears beyond question that a state may prohibit the importation of diseased livestock, even if similarly diseased livestock within the state may be treated with the hope that they may be cured, rather than being immediately destroyed and disposed of. But under the Solicitor General's "comparable treatment rule" (the only exception to which is "when the articles are *dissimilar*") (Brief of U.S. at 27, emphasis in original) a state would be without the power to restrict the importation of large numbers of contagious, diseased animals if there were any similarly sick animals within the state.

The "different threat" and similar/dissimilar distinction drawn by Petitioner and the Solicitor General is based on an erroneous interpretation of the basis of this Court's decision in *Maine v. Taylor*. States may prohibit the importation of sick cows, even though there are similarly sick cows within the state; the reason, apart from the origin of the out-of-state cows, is that they are *sick*. Alabama does not prohibit the importation of diseased Florida cattle because they are diseased *Florida* cattle, it does so because they are *diseased* Florida cattle. Likewise, Alabama does not control the importation of out-of-state hazardous waste because it is *out-of-state* hazardous waste, Alabama does so because it is out-of-state *hazardous* waste. Apart from its origin, it is *hazardous*. Like diseased livestock, animal carcasses, baitfish infected with parasites, germ-infested rags or other harmful items, the reason, apart from origin, for discrimination is the added danger to the state of having more such items present,

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be invalid on the grounds that similarly dead animals occur and are disposed of within Georgia.

even if the state already has within its borders some similarly dangerous items.

B. The Quarantine Cases Were Decided on Principles Which Form the Basis for This Court's More Recent Decisions, And Are Indistinguishable From This Case.

The quarantine cases cannot be dismissed as having been decided on the basis of some antiquated notion that the articles involved were not "legitimate articles of commerce." This Court rejected that proposition in 1902, calling it "confusion of thought which has given rise to the misconception of the authorities." *Compagnie Francaise v. State Board of Health, Louisiana*, 186 U.S. 280, 390 (1902). The Court went on to state that such an argument

> "ignores the fact that these cases expressly and unequivocally hold that the health and quarantine laws of the several states are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect *on legitimate interstate commerce* are not in conflict with the Constitution."

186 U.S. at 391 (emphasis added).

This Court in *Philadelphia v. New Jersey* stated that the numerous decisions upholding quarantine laws and the like were distinguishable because these cases involved articles "that required destruction as soon as possible because their very movement risked contagion and other evils." 437 U.S. at 628-29. Those cases, however, are not entirely distinguishable on that basis, because they generally did not involve such articles. For example, the cattle that were the subject of *Mintz v. Baldwin* did not require destruction, nor did their very movement cause a risk; they were reshipped back out of New York. 306 U.S. at 348; 2 F.Supp. at 701.

The Indiana statute upheld by this Court in *Clason* did not prohibit the very movement of dead animals. The statute provided for the regulated *movement* within the State to the 38 in-state commercial disposal facilities. *Clason v. Indiana*, —— Ind. ——, ——, 17 N.E.2d 92, 93 (1938), *aff'd*, 306 U.S. 439 (1939).

These cases likewise generally did not involve laws which "simply prevented traffic in noxious articles, whatever their origin," as the Court suggested in distinguishing the cases. 437 U.S. at 629. And the cases did not, as argued by the Solicitor General here, involve measures which applied equally to intrastate and interstate commerce. The Indiana statute upheld in *Clason* prohibited interstate commerce while allowing regulated intrastate commerce. The New York measure upheld in *Mintz v. Baldwin* imposed a requirement for importation which did not apply to in-state cattle, while New York employed a different and less burdensome requirement to control the spread of the disease within the State. As the dissenting judge in the lower court stated:

> Plaintiffs contend that the October order is a burden on interstate commerce and invalid for that reason also. Defendant asserts that it is not discriminatory and applies to all states alike outside of New York.
>
> But it does discriminate in favor of New York cattle dealers and against all others. True, there is inspection provided by state law for New York state cattle, but there is no requirement in such inspection that to be sold in the state they shall come from a herd, all of whose members are free from Bang's disease. The October order requires this of imported cattle but not of domestic cattle.
>
> * * * *
>
> [I]t is a discrimination against citizens of all other states in favor of citizens of New York and is a burden upon interstate commerce.

2 F.Supp. at 715 (Cooper, J., dissenting)

The majority opinion in that case, however, which this Court affirmed, states: "There is not the slightest indication in the Supreme Court decisions that a state must have the same regulations for inspection of diseased cattle within its borders as it requires for those entering it." 2 F.Supp. at 705.[32]

The Solicitor General mischaracterizes the quarantine cases as employing a balancing test similar to the approach of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Brief of U.S. at 24 and n.31. Actually, these cases generally analyze the state measures in question in a manner very similar to the modern "strict scrutiny" test as applied in *Maine v. Taylor*. For example, in *Hannibal & St. Joseph R.R. Co. v. Husen*, 95 U.S. 465 (1878), the Court struck down a Missouri statute prohibiting the importation of a broadly defined class of cattle, holding that Missouri could not exclude this whole class of cattle "without any distinction between such as may be diseased and such as are not." 95 U.S. at 469. This, of course, is just exactly what this Court would have done in *Maine v. Taylor* if the harmful baitfish could have been separated from the uninfected ones. The obvious basis for the holding, although not stated in these terms, is that there was a less discriminatory alternative available to serve the State's purpose—the discrimination could be more narrowly drawn to better identify the cattle which posed the risk sought to be protected against, and not unneces-

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[32] *Mintz v. Baldwin* is of significant modern-day relevance. The state regulatory scheme upheld in that case, requiring that any breeding cattle coming into the state originate from a herd officially certified as free from Bang's disease while requiring testing of individual animals for sales within the state of in-state cattle, is employed today in substantially the same form. *See, e.g.*, Ala. Admin. Code, Chap. 80-3-1. Under the Solicitor General's "equal treatment rule" for similar articles, this regulatory scheme, on its face, would be unconstitutional. Indeed, the only judicial expression we have found even resembling the Solicitor General's "rule" in the context of potentially harmful articles is the dissenting opinion in the lower court in *Mintz*, which would have struck down this regulatory system. *See* 2 F.Supp. at 715-16.

sarily discriminate against healthy cattle. In *Kimmish v. Ball*, 129 U.S. 217 (1889), a measure which differed essentially only in that it more narrowly defined the cattle to be discriminated against was upheld, and *Husen* distinguished, on the basis that the State had adequately identified those cattle which posed risks to the State; i.e., there were no less discriminatory alternatives reasonably available. Further, in *Asbell v. Kansas*, the Court upheld a State measure prohibiting importation of diseased cattle where the cattle were inspected to identify those which were diseased; unlike the problem baitfish in *Maine v. Taylor*, diseased cattle could be identified by inspection.[33]

In other cases, the Court upheld restrictions on interstate commerce only after finding that the state had a legitimate reason for the restriction, and that the measure did not unnecessarily restrict nondangerous items, such as healthy livestock, which could be separately identified—that is, that there were no reasonably available alternatives. *See, e.g.*, cases cited *supra* n.23. In one case strikingly similar to *Maine v. Taylor* in this respect, the Court upheld against a dormant commerce clause challenge a restriction on the importation of all alfalfa hay from certain states, the purpose of which was to prevent the spread of the alfalfa weevil, on the grounds that it was not feasible to inspect the hay to identify which hay was infected with the eggs of this pest. (The Court went on to find the measure preempted by a federal measure.) *Oregon-Washington R. & Nav. Co. v. Washington*, 270 U.S. 87 (1926).

[33] This Court in *Asbell v. Kansas* did not uphold the Kansas law on the grounds that some similar requirement was imposed on intrastate movement of cattle; the Court upheld the law because the Commerce Clause does not preclude a state from controlling the movement of diseased cattle into the state, irrespective of what different and less burdensome measures the state may employ within the state. *Mintz v. Baldwin*, 2 F.Supp. 700, 705 (N.D.N.Y.), *aff'd*, 289 U.S. 346 (1933). ("There is not the slightest indication in the Supreme Court decisions that a state must have the same regulations for inspection of diseased cattle within its borders as it requires for those entering it.")

The Court was not engaging in a balancing test in these cases, and the regulatory measures involved generally were not "evenhanded." Just as in *Maine v. Taylor*, the Court in these older cases accepted that, if the state had a legitimate purpose, the state could restrict the importation in interstate commerce of the articles against which the state's purpose was to protect. And just as in *Maine v. Taylor*, the Court considered whether the state's purpose was being accomplished without unnecessarily discriminating against nondangerous items. The standard employed by this Court to judge the validity of state measures discriminating against interstate commerce—that the measures in question advance a legitimate state purpose which cannot be adequately served by reasonable nondiscriminatory alternatives—is not a new standard. It is a succinct expression of the reasoning employed by the Court in the numerous cases upholding legitimate exercises of the states' police power, or distinguishing invalid measures from those which were legitimate, over the almost century and a half that this Court has been reviewing such state measures under the Commerce Clause. This standard does not displace the quarantine cases, it summarizes them.

C. Petitioner's "Different Threat" Theory and the Solicitor General's "Comparable Treatment Rule" Are Based on an Erroneous Interpretation of This Court's Decision in *Maine v. Taylor*.

Petitioner and the Solicitor General imaginatively attempt to distinguish *Maine v. Taylor* from this case and the earlier quarantine cases by setting up a strawman "dispositive fact"—that Maine was attempting to exclude a new threat, one different in kind from any problem already existing in the State. They argue the "dispositive fact" was that at least one or more of the parasites had not been previously found in Maine. The error of this interpretation of that case is made clear simply by hypothetically assuming contrary facts and considering, under the Court's analysis, whether these facts would have changed the outcome of the case. Assume, for example,

that the parasites and non-native species had been fairly well established in Maine, and that Maine had an in-state program to control and limit the extent of environmental damage by regulating the growth and spread of the damage. Maine clearly would have a legitimate interest in controlling the growth of the problem. Prohibiting the importation of baitfish which increased the danger would serve a legitimate state purpose, because Maine's efforts to control the damage within the State would be futile if it could not control the importation of large numbers of additional harmful baitfish. Notwithstanding the fact that the imported baitfish were in all respects identical to those harmful baitfish within the State, Maine would have a reason, apart from origin, for prohibiting their importation—these additional problem fish would increase in degree the environmental damage the State sought to limit, and frustrate the State's efforts to control the problem existing within the State. The reason, apart from origin, is the environmental danger posed by the imported baitfish, not some difference between these baitfish and those already within the State.

In this hypothetical scenario, the "available nondiscriminatory alternative" test would be applied just as it was applied by this Court in the case. The Court would consider whether there were reasonably available alternatives which would allow Maine to exclude only the harmful baitfish without the necessity of excluding all baitfish. But under Petitioner's "different threat" theory, or the Solicitor General's "comparable treatment rule," Maine would have an available nondiscriminatory alternative, namely: to allow unlimited importation of the indistinguishable out-of-state baitfish, then nondiscriminatorily try to control the enormous additional problems within the State in the same manner that the State was employing to try to cope with the limited damage it already had.

Although this Court found it to be "of little relevance that fish can swim directly into Maine from New Hampshire," 477 U.S. at 151, under the standard proposed by Petitioner and the Solicitor General this possibility would

be very relevant. If the validity of Maine's control over the importation of baitfish turned on there being no similarly harmful baitfish within the State, the Maine statute would immediately become unconstitutional when a harmful fish swam into Maine. There would no longer be a "different threat." Because imported baitfish would no longer be dissimilar to in-state harmful baitfish, the Solicitor General's "equal treatment rule" would require that Maine allow uncontrolled importation of more harmful baitfish. The continued validity of the Maine statute would depend entirely on the nonoccurrence of a possibility the Court found to be of little relevance.

The analysis of the Court in *Maine v. Taylor* produces the same conclusion even if it is assumed that the out-of-state baitfish were indistinguishable from problem baitfish already within the State. Maine's power to ban the importation of baitfish rested on the *threat*, not on some different nature of the threat. This is consistent with this Court's earlier decisions considering prohibitions on the importation of diseased livestock and other dangerous articles.[34] These cases did not discuss, much less turn on, whether the particular harm was already present in the state. If such a pointless distinction were valid, many existing state health, safety and environmental regulations would be invalid on the grounds that they merely guard against increasing the degree of dangers, rather than against dangers different in kind.

D. A Standard of General Application, Based on the Construction of the Commerce Clause Argued by Petitioner and the Solicitor General, Would Invalidate Scores of Existing State Health, Safety, Environmental and Quarantine Laws and Regulations, Many of Which Are Identical or Indistinguishable From Measures Previously Upheld by This Court.

The Commerce Clause standard urged upon this Court by Petitioner and the Solicitor General has implications far broader than the context of state measures to control dangerous wastes. A standard of general application,

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[34] See cases cited *supra* n.23.

based on the construction of the Commerce Clause argued by Petitioner and the Solicitor General, would invalidate scores of existing state health, safety, environmental and quarantine laws and regulations, many of which are identical or indistinguishable from measures previously upheld by this Court.[35] The only way to hold for Petitioner in this case without invalidating state measures which control the spread of other forms of "disease, pestilence and death",[36] is to carve out a special, unique rule under the Commerce Clause for the waste involved in this case. Such meticulous carving is more appropriately the role of Congress than of a Court enunciating constitutional principles.

E. This Additional Fee Is Constitutionally Indistinguishable From any Other Form of Regulatory Control Over Importation of Articles Which Spread Disease, Pestilence and Death.

This Court's decisions establish that states may impose such restrictions on interstate commerce as may be appropriate for public health and environmental protection. Petitioner and amici attempt to distinguish

[35] Examples of state statutes which appear to facially violate the Solicitor General's "equal treatment rule" include: Ark. Stat. Ann. § 2-22-11 (controlling importation of bees); Conn. Gen. Stat. Ann. § 22-325 (poultry); *id.* § 22-308 (cattle and goats); Del. Code Ann. tit. 3, § 7304 (cattle); Ga. Code Ann. § 4-4-119 (horses); *id.* § 4-5-8 (dead animals); Idaho Code § 25-214A (livestock); Mass. Gen. Laws Ch. 129, § 14D (hogs); R.I. Gen. Laws §§ 4-4-19, 4-5-7 (animals); Vt. Stat. Ann. tit. 6, § 1461 (animals).

[36] As this Court stated in *Bowman v. Chicago & Northwestern R. Co.*:

> "Doubtless the States have power to provide by law suitable measures to prevent introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death . . . . The self-protecting power of each State, therefore, may be rightfully exerted against their introduction, and such exercises of power cannot be considered regulations of commerce prohibited by the Constitution."

125 U.S. at 489.

Maine v. Taylor and the older quarantine cases by arguing that the Additional Fee is merely a tax, and not a ban on importation. This Court's prior decisions upholding laws restricting commerce for health and environmental reasons have not always involved complete prohibitions on importation. For example, the New York measure upheld in *Mintz v. Baldwin* allowed cattle to be brought into the state for grazing, feeding, or slaughter. The measure was designed to control the risk by preventing cattle from moving into breeding or dairy herds, where the risks were greater. As the Court has stated, such measures "must vary with the nature of the disease to be defended against." *Smith v. St. Louis & Southwestern R. Co.*, 181 U.S. at 257. "It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality." *Id.*, 181 U.S. at 258. Under the circumstances of this case, an economic disincentive to the importation of waste is an appropriate measure to control the level of risk to which the State is exposed.

The use of an economic disincentive to influence and regulate behavior is not a novel idea, and is especially appropriate in the area of environmental regulation because it both allows for and forces a transition to alternatives while allowing the greatest flexibility in developing alternatives to the discouraged activity. For example, in sections 4861-62 of the *Internal Revenue Code*, Congress has implemented an economic disincentive in the form of an excise tax on ozone-depleting chemicals. The excise is scheduled to increase annually to ratchet up the disincentive, thereby increasing the incentive to find and use alternatives. Similarly, the "Gas Guzzler" excise tax in section 4064 of the *Internal Revenue Code* imposes a deterrent levy of up to $7,700 (as doubled in 1990) on cars failing to meet specified fuel economy standards. These measures, like the Additional Fee, are not designed primarily to produce revenue; the ultimate objective is

that the environmental measures work and progressively produce less revenue.[37]

Maine v. Taylor and the older quarantine cases involved the spread of harmful living organisms—parasites, smallpox virus, insects, germs in diseased animals or decayed meat. These living organisms multiply on their own; one germ becomes millions of germs, and the millions of germs cause the harm sought to be avoided. Drums of hazardous waste, of course, do not reproduce. It is not necessary, therefore, to exclude the first drum in order to control the potential harm of millions of drums. The risk created by hazardous waste and other similarly dangerous waste materials is proportional to the *volume* of such waste materials present (J.A. 18, 22, 51), and may be controlled by controlling that volume.[38] Obviously, 40,000 truckloads of hazardous waste in 1989 are far more threatening than four to six thousand truckloads of in-state waste. Pet. App. 62a. The argument that the rationale of the quarantine cases does not apply because Alabama has not totally banned the importation of such waste fails to take into account this significant distinction.

[37] Economic incentives and disincentives are highly desirable, in appropriate contexts, as regulatory measures. This form of regulation allows the greatest flexibility for experimentation and innovation in the development of a variety of alternative methods to meet the goals of the regulatory action, as opposed to simply requiring industry to adopt the choice of a regulatory agency. The idea, of course, is that Adam Smith's "invisible hand," given the incentive, is more likely than the strong arm of government to ultimately produce the optimum solution. In spite of this, the amicus brief of the American Trucking Associations urges this Court to strip the States of all power to use this form of regulation, even though the States clearly would have the power to accomplish the same purposes by regulations requiring specific actions chosen by state regulators. Brief for American Trucking Associations at 12.

[38] As the Solicitor General recognizes, "Alabama's legitimate concerns relate to the *volume* of hazardous waste disposed of within the State, not to its source." Brief for U.S. at 19 (emphasis in original). Alabama is not controlling the importation of hazardous waste because of its source; the reason, apart from the origin of the waste, is that these large volumes of hazardous waste are *dangerous*.

Although hazardous waste is not directly analogous to disease organisms in that it takes only one germ to start an epidemic, the release of either may cause disease, pestilence and death, and thus the reasoning of the cases which allow discrimination against interstate commerce applies equally to poisons. In either case, the State's interest in protecting public health, safety, and the environment allows controls on interstate commerce. The fact that Alabama's restriction is in the form of an economic disincentive, which allows and encourages a transition, rather than a complete ban which might cause temporary inconveniences to the operations of some industries, does not alter this conclusion.

IV. Alabama's Differential Fee Structure Serves A Legitimate State Purpose Which Cannot Be Adequately Served By Any Nondiscriminatory Alternative.

A. Alabama's Differential Fee Structure Is Demonstrably Justified by Valid Factors Unrelated to Economic Protectionism.

Discriminatory statutes are struck down "*unless* the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, —— U.S. ——, 117 L.Ed. 2d 1, 22 (1992) (emphasis added). This Court has defined economic protectionism as "'measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Wyoming v. Oklahoma*, 117 L.Ed. 2d at 22 (quoting *New Energy Co.*, 486 U.S. 269, 273). The legislative findings accompanying the Act, the trial court's findings and the record in this case clearly establish that Alabama's differential fee structure was designed to protect the health and safety of the State's citizens and the integrity of the environment. The health, safety, and environmental dangers resulting from landfilling these wastes are a valid factor, unrelated to economic protectionism, justi-

fying Alabama's restriction on the importation of the wastes.[39]

The transportation of hazardous waste to landfills, where the wastes remain hazardous *forever*, merely amounts to moving a problem from one place to another, and postponing the time when the social, environmental and economic costs of finally dealing with the problem must be faced. Transporting such waste from one state to a landfill in another also shifts these social, environmental and economic costs to a different set of voters and taxpayers. The bulk of Petitioner's business consists of shifting these problems from other states to Alabama, and tranferring to Alabama the perpetual economic and social costs.

Petitioner argued below that Alabama need not worry about the perpetual risks to the state of holding in its lap what is probably the largest collection of dangerous materials of this type ever assimilated in one place in the history of mankind, simply because the State may attempt to recover under federal law future clean-up costs from those responsible for the waste.[40] Aside from the fact that this argument ignores the question of whether the social and environmental consequences can ever be measured in dollars, Petitioner failed to point out the exception which swallows the general rule of joint and several liability. The federal statute cited as creating liability, 42 U.S.C. § 9607, also *completely absolves* from

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[39] Far from being designed to benefit in-state economic interests, the Act itself anticipates significant *adverse* local economic effects. Section 7 of the Act (Pet. App. 110a-111a) commits the State to make payments to local government bodies to offset the adverse economic impact of a reduction in the volume of waste disposed of at Emelle. As shown by a Livingston University study (C.R. 471-508) Petitioner's waste disposal business is the driving force in the regional economy of west-central Alabama.

[40] This assumes that the waste generators can be identified. But in the case of out-of-state waste which has moved through brokers, the identity of the generator and the source of the waste is unknown even to Petitioner. See *supra* n.24.

liability the owner or operator of a facility, the generators of the hazardous waste, all other potentially liable persons where clean-up is made necessary due to acts of third parties or acts of God, such as tornadoes or earthquakes. 42 U.S.C. § 9607(b). In the event of a major natural disaster, *no one would be liable.*

Petitioner argues that Alabama's fee structure amounts to simple economic protectionism simply because Alabama hazardous waste generators may dispose of their wastes in Alabama at a cost lower than the cost to out-of-state waste generators to dispose of their wastes *in Alabama.* Brief for the Petitioner at 26. Simliarly, if Alabama provides for the management within the State of diseased plants or animals, Alabama producers may be advantaged relative to producers in states which fail to make such provision. In either case, any competitive disadvantage is *not* caused by the state which has provided for the needs of its own industry, it is caused by the failure of the disadvantaged producer's state to permit or provide for the infrastructure necessary to that producer's operations. The failure of one state to permit management within the state of its own dangerous articles does not compel another state to take up its burden.

Maine baitfish producers undoubtedly prospered as an incidental effect of Maine's actions and this Court's decision. And Alabama industry may benefit relative to industries in states which refuse to accept their responsibility for permitting the development of waste disposal infrastructure, as an incidental effect of Alabama's efforts to protect its environment and the health of its citizens. These incidental effects do not transform clearly legitimate measures to protect against grave dangers into forbidden economic protectionism.

Petitioner and amici argue that it is economically more efficient to ship waste a short distance across state lines than a longer distance within a state. This is obviously true, but it explains only a tiny fraction of the movement of out-of-state waste to west-central Alabama. If the

Emelle facility were simply receiving most or all of Mississippi's waste, and perhaps some from other adjacent or nearby states, it is unlikely that Alabama would have ever felt the need to enact legislation of this kind. But "economic efficiency" and "natural market forces" entirely fail to explain why hazardous waste is hauled all the way across the continent to Alabama. The level of traffic in hazardous waste is not due to the value of commerce in the waste. It is due instead to the fact that other states force such waste to be exported due to the negative value, the risk, of having such waste within the state, and the fear that any attempt at in-state disposal will result in an inability to protect the state from large-volume importation of more hazardous waste.[41] Political forces, not market forces, drive this flow of hazardous waste.

The argument that citizens of other states do not elect Alabama's officials has another side—Alabama citizens, who are bearing the burden of those other states' hazardous waste, do not elect those champions of the environment in other states who refuse to provide for disposal of their own such wastes. "Send it to Alabama" is far easier to implement than a responsible waste management policy.[42]

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[41] One of the greatest obstacles to the development of new facilities in other states is the understandable fear, arising from overly broad interpretations of *Philadelphia v. New Jersey*, that any effort to manage their own waste will result in litigation which may leave the local citizens powerless to protect themselves from being buried in hazardous waste from other states. Under the interpretation of the Commerce Clause advanced by Petitioner and its supporters in this case, it would be a foolish state indeed that would issue a permit for any new commercial hazardous waste disposal facility.

[42] The fact that Alabama has tolerated the landfilling in the State of large volumes of out-of-state hazardous waste in past years, and only acted to slow the flow somewhat after the volumes had become overwhelming, indicates that the interests of out-of-state hazardous waste generators are in fact quite well represented in Alabama. Petitioner, its numerous employees and local businesses serving Petitioner and its employees are a significant in-state economic interest adversely affected by any reduction in the volume of hazardous waste imported for landfilling.

Similarly, industries in other states find it much more palatable to argue in this Court, as amici, for their "right" to send their waste to Alabama cheaply, than to be environmental villains at home by suggesting that their own state permit the infrastructure necessary for them to operate. Alabama has implemented waste minimization programs to control and reduce the in-state production of hazardous waste, but these efforts are futile if the State continues to be overwhelmed by additional waste from outside the State.[43] The only means available to Alabama citizens to protect themselves from the "send it elsewhere" waste management policies of other states is to make Alabama a *less* attractive alternative than a responsible state waste management policy.

Petitioner and its amici argue that Alabama citizens enjoy the products of other states, the production of which may produce pollution such as air or water discharges in those states, but wish to avoid the problems of the hazardous waste generated by that production. Of course, those states are free to control, to whatever extent they desire, those air and water pollution problems. Many of those states are also controlling the hazardous waste produced by requiring that it all be sent out of the state. That an Alabama citizen buys a car does not mean that he must be forced to bear the burden of *all* of the hazardous waste generated in the production of *all* of the cars sold in the entire nation, simply because citizens of other states wish to avoid the problem entirely.

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[43] With imported hazardous waste accounting for approximately ninety percent of all hazardous waste landfilled in Alabama, the State's efforts to reduce the generation of hazardous waste within the State by technical assistance in developing process modifications and other similar means (see R.T. 260-61; 287-88) can have no significant impact in reducing the dangerous volumes of hazardous waste accumulating in the State. If Alabama were able to reduce in-state hazardous waste generation by *one-half*, this would amount to a mere five percent reduction in the landfilling of hazardous waste in the State.

Disposal capacity for Alabama's waste is not an issue in this case. Petitioner's Vice President of Operations for the Southern Region, Rodger Henson, testified that the Emelle facility alone had capacity for at least another 100 years of operations, without a reduction in the rate of accumulation. J.A. at 9. And there is no shortage of other potential locations. The chalk formation which Petitioner claims to be particularly well suited for locating such facilities is extensive across Alabama (and several other states). J.A. 52; R.T. 471-72, 622. Even with no restrictions on the rate of accumulation of waste at the Emelle facility, there is no imminent (or even foreseeable) shortage of existing capacity for the disposal of Alabama's own hazardous waste, and no shortage of other potential sites for the disposal of the State's waste. The argument that Alabama is simply "conserving" a place to dispose of its own hazardous waste is factually erroneous.

Petitioner and its amici seek to analogize Alabama's restriction on the dumping of out-of-state hazardous waste at the Emelle facility to the hoarding of a natural resource for in-state use. But that facility is not a "natural resource." It is an engineered, artificially created, man-made facility [44] which exists and operates solely at the pleasure of the State of Alabama. Unlike coal, or oil or natural gas, the Emelle facility did not simply happen to occur in Alabama as an accident of nature. The facility was created only because the State allowed it to be created, and continues to exist and operate only because the State finds it to be in the State's own interest to provide for the disposal of *its own* hazardous waste. Petitioner's "right" to bury hazardous waste there is limited to the right to bury only such waste as the

[44] Petitioner's expert witness and long-time consultant William Brummond testified that a hazardous waste landfill could be engineered to meet regulatory requirements in most if not all states. J.A. 142-43. As explained in the amicus brief submitted by the States of Ohio and Kentucky, there are few locations where a facility *cannot* be designed to meet regulatory requirements.

State may find to be in the State's interest to permit. The Emelle facility is not a natural resource; it is an activity, or land use, which poses grave dangers to the State. The State may tolerate this activity only to the extent that it serves the State's purpose, and the State may limit the activity to that extent.

B. Alabama's Legitimate Purpose Cannot Be Adequately Served by Any Nondiscriminatory Alternative.

Under this Court's precedents, a state measure restricting the importation of out-of-state articles is valid under the Commerce Clause where the measure serves a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.[45] *New Energy Co.*, 486 U.S. at 728; *Maine v. Taylor*, 477 U.S. at 140. It cannot be credibly disputed that Alabama has a legitimate interest in controlling the significant health and environmental risks created by the landfilling of enormous quantities of highly dangerous wastes while, at the same time, providing for the regulated disposal of the State's own dangerous waste. The differential fee structure is designed to serve this purpose by reducing the volume of such waste imported into the State for landfilling, without also causing Alabama's own waste to be sent to other states for disposal. The issue raised by Petitioner in this case is whether the final requirement of the test—that the State's purpose cannot be served by available nondiscriminatory alternatives—compels *every* state to choose between either refusing to permit disposal within the State of its own hazardous waste, or accepting its responsibility to manage its own waste at the cost of bearing the perpetual burden of serving as the permanent burial ground for the hazardous waste of those states which choose to avoid their own problems.

[45] "This is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so." *New Energy Co.*, 486 U.S. at 278.

Petitioner contends that Alabama's purpose to reduce the amount of hazardous waste coming into the State for burial could be served as well by imposing an equal fee on disposal of both in-state and out-of-state waste. If the State's purpose included an attempt to encourage its own hazardous waste to be sent out of the State, Petitioner's argument would be correct. But Alabama's purpose is not to force responsibility for its own waste disposal burdens on citizens of other states. The State's purpose in enacting the differential fee structure is to accept the State's responsibility for dealing with its own waste, while protecting its citizens and environment from the risks caused by the importation of large volumes of additional wastes.

An equal fee, at any level, would necessarily fail to serve the State's purpose. An equal fee high enough to provide any significant deterrent to the importation of hazardous waste for landfilling in the State would amount to an attempt by the State to avoid its responsibility to deal with its own problems, by tending to cause in-state waste to be exported for disposal. An equal fee not so high as to amount to an attempt to force Alabama's own problems to be borne by citizens of other states would fail to provide any significant reduction in the enormous volumes of imported hazardous waste being dumped in the State. At the point where an equal fee would become effective to serve the State's purpose in protecting public health and the environment from uncontrolled volumes of imported waste, that equal fee would also become an avoidance of the State's responsibility to deal with its own waste problems.

Under Petitioner's theory of the Commerce Clause, the State's purpose as described above becomes two mutually exclusive goals. A state can accept responsibility for providing for the disposal of its own waste, in which case it must then also accept the burden and inherent dangers of receiving all such wastes from all other states. Or the state can protect its citizens and environment

from burial within the State of overwhelming volumes of waste, by abdicating its responsibilities and trying to force its own waste on other states. Given such a choice, the inevitable result is clear. States will refuse to permit the disposal within the state of their own wastes. Those states which do permit waste disposal will be increasingly overwhelmed by volumes of out-of-state waste. In fact, this situation has already developed [46] as a result of the holdings of several lower federal courts, relying on *Philadelphia v. New Jersey* to summarily strike down any state measure controlling "waste."

V. The Public Interest In The Safe Management Of Hazardous Waste Would Be Better Served By Recognizing, Rather Than Destroying, The Ability Of The States To Control The Interstate Movement Of Hazardous Waste.

A. A Holding by This Court That States Are Powerless To Control the Importation of Hazardous Waste Would Virtually Assure That No State Will Permit the Development of any New Commercial Hazardous Waste Disposal Facilities.

Public awareness of the dangers associated with hazardous waste has made the permitting of new hazardous waste disposal facilities very difficult. A holding by this Court that any such facility which is permitted must be allowed to import and leave the local community burdened with such additional hazardous waste as the operator of the facility may choose would make the permitting of any new commercial hazardous waste landfill a political impossibility. However responsible state officials or the public generally may wish to be about managing their own hazardous waste, no one is so foolish as to allow their local community or their State to become the toxic waste dump for the entire nation. A decision of this Court

[46] The existing imbalance, between the few states with commercial hazardous waste disposal facilities and the relatively numerous states that effectively ban out-of-state waste by refusing to permit such facilities within the state, is discussed at length in the amicus briefs submitted in support of Alabama.

destroying the ability of the states to manage their own hazardous waste and control the additional burdens of imported waste would perpetuate and worsen the "reverse Balkanization" which exists in the disposal of hazardous waste.

Petitioner and its industry seek this Court's assistance to maximize the short-term profitability of the few existing sites at the expense of the people in the states where those few sites are located. The public interest, however, as thoroughly examined and discussed in the amicus briefs submitted by the State of South Carolina, the States of Ohio and Kentucky, and the State and Local Legal Center, lies in the states having the ability to plan for and manage hazardous waste disposal. As the capacity of the few existing sites is exhausted, new sites will be needed. These new sites are unlikely to be developed if allowing their development carries the penalty of having to allow them to operate under the rules Petitioner seeks to have enshrined as a requirement of the Constitution.

B. Affirming the Decision of the Supreme Court of Alabama Will Not Adversely Affect Proper Management of Hazardous Waste.

The greatest obstacles to the development of new hazardous waste disposal facilities include not only the "NIMBY" syndrome, but also the compounding effect of the "fear of *Philadelphia*" syndrome. Clarification by this Court that States may permit the development of hazardous waste disposal facilities free of the fear that such development will result in the local community being drowned in an uncontrolled flood of imported waste will greatly facilitate, not impair, the development of adequate disposal capacity to manage the nation's waste. The specter of "Balkanization," and the other horribles paraded across the briefs, are nothing more than scare tactics, an attempt to influence the Court to base a decision on supposed "bad" consequences rather than upon a reasoned analysis of constitutional principles. Balkan-

ization has not occurred, and is not likely to occur. It should not be presumed that states will act irresponsibly. Waste importing states like Alabama and South Carolina have been quite accommodating considering the burdens and risks transferred to them, and have sought merely to slow the rate of increase in these burdens. Indeed, the reasonableness of Alabama's approach is recognized even by those states that are transferring their burdens and dangers to Alabama, as evidenced by the amicus briefs filed in this case as well as the differential fee-based approach in the policy recently adopted by the National Governors Association. See *supra* n.19 and accompanying text. Congress has established the federal policy that the exercise by the states of their traditional police powers should be the means by which hazardous waste management is accomplished.[47] Alabama's differ-

[47] As explained in detail in the amicus brief filed by the State of South Carolina, Congress in RCRA specifically authorized the states to regulate the management and disposal of hazardous wastes. If a state program meets statutory requirements, the state "is authorized to carry out such program in lieu of the federal program." 42 U.S.C. 6929(b). Alabama's program was authorized pursuant to this federal statutory scheme in 1987. 52 Fed. Reg. 46466 (Dec. 8, 1987). EPA review of state program changes is available. 42 U.S.C. § 6926(e); 40 C.F.R. §§ 271.22-.23. Review of EPA decisions is available in the Circuit Courts of Appeals. 42 U.S.C. § 6973(b). One of the statutory requirements for authorization is that the state program be consistent with the federal or state programs in effect in other states. 42 U.S.C. § 6926. In regulations promulgated by EPA under its congressionally-delegated authority, EPA treats this consistency requirement as the federal statutory standard determining the extent to which states may regulate the interstate movement of hazardous waste; state program provisions, including fees, are authorized unless the provision "unreasonably restricts, impedes, or operates as a ban" on the interstate movement of waste. 40 C.F.R. § 271.4(a). EPA has expressly rejected the applicability of the dormant Commerce Clause and determined that several state programs imposing higher disposal fees on out-of-state waste satisfied the congressional standard governing state restrictions on interstate movement of waste. 54 Fed. Reg. 27170 (June 28, 1989) (Ohio); 53 Fed. Reg. 16264 (May 6, 1988) (Maine); 50 Fed. Reg. 46437 (Nov. 8, 1985) (South Carolina). A holding by this Court that a state's differential fee structure is invalid under the der-

ential fee structure is a reasonable and valid exercise of the State's police power to protect the health and safety of its citizens and the integrity of its environment, and not violative of the Commerce Clause.

CONCLUSION

The Supreme Court of Alabama correctly followed this Court's decision in *Maine v. Taylor*. Alabama has a reason, apart from the origin of the hazardous wastes involved, to control importation of those wastes—they are wastes that are "inherently dangerous to human health and safety and to the environment." Pet. App. 11a. The decision of the Supreme Court of Alabama should be affirmed.

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mant Commerce Clause would create the anomalous situation of raising questions as to the validity under the *dormant* Commerce Clause of state fee structures which have been specifically approved by EPA, acting under its delegated congressional authority, as not violating a statutory standard established by Congress in the *exercise* of its commerce power.

As explained in the amicus brief submitted by the State of New York, Congress also recognized the necessity of state control over interstate movement of hazardous waste when it enacted the capacity assurance provision of § 104(c)(9) of the Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. § 9604(c)(9).

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